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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-263

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

IDAHO POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. In our opening brief, we demonstrated (Br. 8-15) that the deduction of construction-related depreciation claimed by respondent would result in a postponement in the recognition of income respondent has already earned. Respondent in effect concedes this but argues (Resp. Br. 7-16) that the concept of proper income accounting is irrelevant to tax depreciation. Underlying this argument are respondent's contentions that the purpose of the depreciation deduction allowed by Section 167 of the Internal Revenue Code of 1954, 26 U.S.C. 167, is the creation of a fund for the replacement of depreciable assets through the tax-free recovery of acquisition costs, and that the capitalization of construction-related depreciation is somehow incompatible with that purpose. Quite apart from the fact that its argument ignores the injunction of Section 446 of the Code that a taxpayer's accounting method must "clearly reflect income," respondent's contentions are premised upon three fundamental analytical errors.

First, although depreciation deductions do permit the tax-free recovery of acquisition costs, this is not primarily for the purpose of establishing a fund for the replacement of assets. Respondent's "replacement" theory was decisively rejected by this Court last Term in *United States* v. *Chicago, B. & Q. R. Co.*, 412 U.S. 401, 415:

> Whatever may be the desirability of creating a depreciation reserve under these circumstances, as a matter of good business and accounting practice, the answer is, as Judge Davis of the Court of Claims observed * * *, "Depreciation reflects the cost of an existing capital asset, not the cost of a potential replacement." * * *

Notwithstanding respondent's suggestions to the contrary (Resp. Br. 10-11), the accounting profession has also firmly rejected respondent's replacement theory of depreciation and has expressly determined instead that the purpose of depreciation is the proper allocation of historical costs to future periods, *i.e.*, the proper matching of expenses and revenues. See American Institute of Certified Public Accountants, *Accounting Research Bulletin No. 43* (1961). It is precisely that matching which we urge here.

Second, the very existence of depreciation as a tax concept illustrates that Congress was concerned with something more than mere tax-free recovery of acquisition costs. Depreciation deductions are not necessary to cost-recovery; more direct and efficacious provision for the recovery of costs could have been made by allowing an outright deduction for the cost of an asset in the year of acquisition. But Congress, aware that such a deduction would distort the reporting of income, chose to require "a meaningful allocation of [asset acquisition] cost to the tax periods benefited by the use of the asset." *Massey*

Motors v. *United States*, 364 U.S. 92, 96. It was for this allocative purpose, and this purpose only, that the concept of depreciation was necessary.

In other words, the guiding principle of tax depreciation is not cost-recovery as such but the recovery of costs over time through the proper matching of income and expenses.[1] The 1954 liberalization of tax depreciation allowances does not represent a departure from the principle of matching or from proper income accounting. It is a common view among accountants that "[a]ssets actually lose value in a manner that is best reported by the declining-balance method." Rothschild, *The Case for the Declining Balance*, 33 Taxes 503 (1955). It was for this reason that Congress expressly stated that in enacting liberalized depreciation allowances it was not "departing from realistic standards of depreciation accounting." H. Rep. No. 1337, 83d Cong., 2d Sess. 24.

Third, the capitalization of construction-related depreciation would not prevent respondent from fully recovering

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[1]Respondent, arguing that the matching of income and expenses has never been relevant to tax depreciation, erroneously cites (Resp. Br. 9, 38, 47) *Virginian Hotel Corp.* v. *Helvering*, 319 U.S. 523, as holding that idle assets are subject to depreciation. The Court in that case in fact held only that depreciation is deductible in loss years, a holding which obviously conforms to the principle of matching. But the administratively convenient and generally accepted rule that idle assets held for use in business may be depreciated (see *e.g.*, *Carter-Colton Cigar Co. v. Commissioner*, 9 T.C. 219) is also consistent with that principle, for idle assets depreciate in value and such depreciation represents a decrease in the capital invested in the business which should be reflected in the reporting of income.

the costs it incurs in acquiring construction equipment.[2] Capitalization merely spreads the recovery of costs over the life of the newly constructed capital facility. Thus the only issue here is one of timing.

Respondent's contention is that cost-recovery should be achieved by the time the construction equipment itself has been fully exhausted. But the central point in this litigation is that the exhaustion of equipment used in a taxpayer's self-construction of assets does not represent a final disposition of the investment in that equipment; the investment in construction equipment becomes assimilated into the taxpayer's investment in the capital facility constructed with that equipment. It is appropriate therefore that construction equipment costs should be recovered only over the life of the capital facility.[3]

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[2]Some of respondent's equipment was used for both construction and maintenance. It is only the depreciation incurred in construction which we contend must be capitalized. But the allocation of depreciation between construction activities and maintenance activities is a simple accounting matter, similar to that of apportioning depreciation between business and nonbusiness uses. See, *e.g.*, *The Motel Co.* v. *Commissioner*, 340 F. 2d 445 (C.A. 2).

[3]In arguing the contrary, respondent relies upon *Massey Motors* v. *United States*, *supra*, and *United States* v. *Ludey*, 274 U.S. 295. But, as we have previously indicated, the Court in *Massey Motors* spoke in terms of "the tax periods benefited by the use of the asset" (364 U.S. at 96). See, also, *Hertz Corp.* v. *United States*, 364 U.S. 122, 126. The periods benefited by respondent's use of its construction equipment extend throughout the lives of the capital facilities which it constructs. And the Court in *Ludey* viewed (274 U.S. at 301) depreciation as representing the "gradual sale" of an asset as it is used up. The concept of a "sale" implies the final disposition of an investment. Respondent in constructing new facilities does not dispose of its investment in construction equipment; that investment simply becomes incorporated into the larger investments in the capital facilities themselves. Any "gradual sale" or disposition occurs only over the lives of those facilities.

The method of cost recovery which we urge harmonizes with the tax treatment accorded other costs of construction. For example, the cost of tools used up and discarded in the course of construction is also recoverable only over the life of the constructed facility. The same is true of the cost of construction materials and of wages paid to construction workers. Because all these costs are really only individual components of the capital investment in the constructed facility, they are properly recoverable only over that facility's life.[4] In advancing its theory of cost-recovery, respondent has shown no reason why its depreciation costs should uniquely be currently recoverable.

2. We showed in our opening brief (Br. 15-20) that Sections 161 and 263, read together, generally[5] require the capitalization of expenditures incurred in the acquisition of capital assets, even when those expenditures would othewise be deductible under Sections 162-188. To that showing, respondent appears to make three closely related responses, none of which has any merit.

Section 161 by its express terms makes Sections 162-188 subject to, *inter alia,* the capitalization requirement of Section 263. Respondent repeatedly attempts to dismiss Section 161 as a "housekeeping section" (Resp. Br. 22, 27). Although we have no principled

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[4]To the extent that the recovery of such component costs should be viewed as contributing to a "replacement" fund (see Resp. Br. 10-11), it is to a fund for the ultimate replacement of the capital facility, not for the immediate replacement of the separate items used up in its construction.

[5]Sections 263 and 266 explicitly exclude certain items from the requirement of capitalization.

objection to the term "housekeeping section," we believe the term "priority-ordering section" would be more accurate since the evident function of Section 161 is to specify those provisions of the Code which are to have priority in cases of conflict. Respondent's characterization of Section 161 as a "housekeeping section" does not deprive it of its priority-ordering force.[6]

Respondent also argues that since the government in this case has allowed the deduction of pension contributions and social security tax payments made on behalf of its construction workers, and of motor vehicle taxes incurred with respect to construction equipment, the question whether a construction cost "must be capitalized * * * turns on the intention of Congress as manifested in the provisions of the statute" (Resp. Br. 21). We agree. We pointed out in our opening brief (Br. 18) that taxes are specifically exempted by Section 266 from the requirement of capitalization; furthermore, pension contributions are made currently deductible by Section 404, which is not subject to the priority-ordering of Section 161.[7] No similar provision exempts respondent's

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[6]Respondent errs (Resp. Br. 26-27) concerning the origin of Section 161. That Section and Section 261 are the 1954 Code equivalents of the introductory phrases of Sections 23 and 24 of the 1939 Code which, taken together, served the same priority-ordering function. Section 261 now provides that "no deduction shall in any case be allowed in respect of the items [including capital expenditures] specified in this part." Thus the capitalization requirement of Section 263 would take precedence over the deductions permitted elsewhere even if Section 161 did not exist.

[7]Pension contributions made by a taxpayer on behalf of employees working on self-construction projects have long been considered currently deductible by the Internal Revenue Service. I.T. No. 3408, 1940-2 Cum. Bull. 178. We understand, however, that the scope of that ruling is presently under review. See note 6, *supra*.

construction-related depreciation from the requirement of capitalization.

Respondent further contends (Resp. Br. 19-21) that Section 263 and its predecessors have never been interpreted as requiring the capitalization of interest and taxes. But the cases upon which respondent relies involved taxes and interest payments in the nature of carrying charges. The courts concluded that since such carrying charges "do not improve the value of the property, but are payments necessary to the mere retention of ownership" (*Fraser* v. *Commissioner*, 25 F.2d 653, 654 (C.A. 2) (L. Hand, J.)), they could not properly be treated as capital items.[8] By contrast, the depreciation at issue in this case was incurred in the construction of capital facilities, *i.e.*, in "improv[ing] the value of [respondent's] property," and is therefore clearly a capital item. Thus the early cases holding that certain interest and tax payments were not capital in nature and therefore not capitalizable are simply not in point. The issue here is whether items which are clearly capital in nature must be capitalized.

3. We concluded our opening brief by showing (Br. 20-25) that construction-related depreciation is covered by the terms of Section 263. Respondent does not directly contest the validity of the Treasury Regulations which construe Section 263 as requiring capitalization of the "cost of acquisition, construction, or erection of buildings * * * and similar property * * *." 26 C.F.R. 1.263

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[8]The predecessor of Section 266, Section 130 of the Revenue Act of 1942, 56 Stat. 798, 827, was subsequently enacted in order to permit the capitalization of such carrying charges.

(a)-2(a). Nor does respondent directly deny that construction-related depreciation is an acquisition cost. Respondent nevertheless contends (Resp. Br. 32-47) that construction-related depreciation is not the kind of acquistion cost whose capitalization is contemplated by the statute.

In making this argument, respondent finds itself in flat disagreement with the Secretary's reading of the statute, for the Treasury Regulations require capitalization of the depreciation incurred in a taxpayer's self-construction of assets. A fair reading of the broad regulatory provisions promulgated by the Secretary with respect to Section 263 compels that conclusion. Moreover, the Secretary has indicated elsewhere that such depreciation is not deductible but must be "added to the basis of property being constructed, reconstructed, or erected by the taxpayer." 26 C.F.R. 1.48-1(b)(4). It is a familiar canon of statutory construction that "great deference [is owed] to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16.

Respondent attempts to draw support for its construction of the statute from Sections 174, 182, 615, 616, and 617, which permit construction-related depreciation to be deducted in certain narrowly defined circumstances. Yet those provisions clearly demonstrate the unsoundness of respondent's position in this litigation. The purpose of each of those provisions is to permit a business taxpayer to deduct items which would otherwise be capital in nature; by expressly designating construction-related depreciation as a deductible expenditure for purposes of those provisions, Congress evidenced its awareness that such depreciation would otherwise have to be capitalized.

Section 182, for example, permits a taxpayer already engaged in the business of farming to deduct land-clearing expenditures, expressly including depreciation on the equipment used in clearing the land. If respondent's contention in this case were sound, such depreciation would have been deductible without regard to Section 182. A farmer's land-clearing equipment is used in his trade or business for purposes of the depreciation deduction under Section 167 in just the same way that respondent's construction equipment is used in its trade or business. See Resp. Br. 23-26. See, also, *Great Northern Railway Co.* v. *Commissioner*, 30 B.T.A. 691, 707-708.[9] Depreciation on land-clearing equipment was nevertheless "chargeable to [the] capital account" (Section 182(a)) prior to the enactment of Section 182 because it was capital in nature. In enacting Section 182, Congress extended to farmers the election of treating such depreciation as a currently deductible item not subject to the requirement of capitalization. Respondent has not been granted such an election with respect to its construction-related depreciation.

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[9]Respondent incorrectly describes (Resp. Br. 28, n. 13) *Great Northern Railway Co.* as holding that construction-related depreciation "was not to be capitalized." The Commissioner there had failed to argue that the depreciation was required to be capitalized under the predecessor of Section 263. As the court recognized (30 B.T.A. at 708), the only issue before it therefore was whether the equipment in question had been "used in the * * * trade or business" for purposes of the predecessor of Section 167. That issue concededly is not involved here. See. Br. 9; Resp. Br. 23-26. The issue here is the scope of the capitalization requirement of Section 263.

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1974.

DOJ-1974-02

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COMMISSIONER OF INTERNAL REVENUE *v.* IDAHO POWER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-263. Argued February 27, 1974—Decided June 24, 1974

Section 167 (a) of the Internal Revenue Code of 1954 allows a depreciation deduction from gross income for "property used in the [taxpayer's] trade or business" or "held for the production of income," whereas § 263 (a) (1) of the Code disallows a deduction for "[a]ny amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate," expenditures which, the regulations state, include the "cost of acquisition, construction, or erection of buildings." Section 161 makes the deductions specified in that part of the Code, including § 167 (a), subject to the exceptions provided in the part including § 263. Respondent public utility claimed a deduction from gross income under § 167 (a) for *all* the depreciation for the year on its transportation equipment (cars, trucks, etc.), including that portion attributable to its use in constructing capital facilities, although on its books, as required by the regulatory agencies, it charged such equipment, to the extent it was used in construction, to the capital assets so constructed. The Commissioner of Internal Revenue disallowed the deduction for the construction-related depreciation, ruling that depreciation was a nondeductible capital expenditure under § 263 (a). The Commissioner was upheld by the Tax Court, but the Court of Appeals reversed, holding that a deduction expressly enumerated in the Code, such as that for depreciation, may properly be taken even if it relates to a capital item, and that § 263 (a) (1) was inapplicable because depreciation is not an "amount paid out" as required by that section. *Held:* The equipment depreciation allocable to the taxpayer's construction of

capital facilities must be capitalized under § 263 (a)(1). Pp. 8–17.

(a) Accepted accounting practice and established tax principles require the capitalization of the cost of acquiring a capital asset, including the cost incurred in a taxpayer's construction of capital facilities. The purpose of depreciation accounting is the allocation of the expense of using an asset over the tax periods benefited by that asset. Pp. 8–11.

(b) Construction-related depreciation is not unlike expenditure for other construction-related items, such as construction workers' wages, which must be treated as part of the cost of acquiring a capital asset. The significant fact is that the exhaustion of the construction equipment does not represent the final disposition of the taxpayer's investment in that equipment; rather such investment is assimilated into the cost of the capital asset constructed, and this capitalization prevents the distortion of income that would otherwise occur if depreciation properly allocable to asset acquisition were deducted from gross income currently realized. Pp. 11–12.

(c) Capitalization of construction-related equipment depreciation by the taxpayer which does its own construction work maintains tax parity with the taxpayer which has such work done independently. P. 12.

(d) Where a taxpayer's generally accepted method of accounting is made compulsory by the regulatory agency *and* that method clearly reflects income, as here, it is almost presumptively controlling of federal income tax consequences. Pp. 12–13.

(e) Considering § 263 (a)'s literal language in denying a deduction for "[a]ny amount paid out" for construction or permanent improvement of facilities, and its purpose to reflect the basic principle that a capital expenditure may not be deducted from current income, as well as the regulations indicating that for purposes of § 263 (a) "amount paid out" equates with "cost incurred," there is no question that the cost of the transportation equipment was "paid out" in the same manner as the cost of other construction-related items, such as supplies, materials, and wages, which the taxpayer capitalized. Pp. 13–15.

(f) The priority-ordering directive of § 161 requires that § 263 (a)'s capitalization provision take precedence, on the facts, over § 167 (a). Pp. 15–17.

477 F. 2d 688, reversed.

Syllabus

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-263

Commissioner of Internal Revenue, Petitioner, v. Idaho Power Company.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 24, 1974]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the sole issue whether, for federal income tax purposes, a taxpayer is entitled to a deduction from gross income, under § 167 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 167 (a),[1] for depreciation on equipment the taxpayer owns and uses in the construction of its own capital facilities, or whether the capitalization provision of § 263 (a) of the Code, 26 U. S. C. § 263 (a),[2] bars the deduction.

The taxpayer claimed the deduction, but the Commissioner of Internal Revenue disallowed it. The Tax Court

[1] "§ 167. Depreciation.

"(a) General rule.

"There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

"(1) of property used in the trade or business, or

"(2) of property held for the production of income."

[2] "§ 263. Capital expenditures.

"(a) General rule.

"No deduction shall be allowed for—

"(1) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate."

(Scott, J., in an opinion not reviewed by the full court) upheld the Commissioner's determination. 29 T. C. M. 383 (1970). The United States Court of Appeals for the Ninth Circuit, declining to follow a Court of Claims decision, *Southern Natural Gas Co.* v. *United States*, 188 Ct. Cl. 302, 372–380, 412 F. 2d 1222, 1264–1269 (1969), reversed. 477 F. 2d 688 (1973). We granted certiorari in order to resolve the apparent conflict between the Court of Claims and the Court of Appeals. 414 U. S. 999 (1973).

I

Nearly all the relevant facts are stipulated. The taxpayer-respondent, Idaho Power Company, is a Maine corporation organized in 1915, with its principal place of business at Boise, Idaho. It is a public utility engaged in the production, transmission, distribution, and sale of electric energy. The taxpayer keeps its books and files its federal income tax returns on the calendar year accrual basis. The tax years at issue are 1962 and 1963.

For many years, the taxpayer has used its own equipment and employees in the construction of improvements and additions to its capital facilities.[3] The major work has consisted of transmission lines, transmission switching stations, distribution lines, distribution stations, and connecting facilities.

During 1962 and 1963, the tax years in question, taxpayer owned and used in its business a wide variety of automotive transportation equipment, including passenger cars, trucks of all descriptions, power operated equipment, and trailers. Radio communication devices were affixed to the equipment and were used in its daily opera-

[3] For a period near the end of World War II, the taxpayer constructed all its capital improvements. At other times, outside contractors have performed part of this work. At the time of the trial of this tax case, the taxpayer had 140 employees engaged in new construction; it has had as many as 300 employees so engaged.

tions. The transportation equipment was used in part for operation and maintenance and in part for the construction of capital facilities having a useful life of more than one year.

On its books, the taxpayer used various methods of charging costs incurred in connection with its transportation equipment either to current expense or to capital accounts. To the extent the equipment was used in construction, the taxpayer charged depreciation of the equipment, as well as all operating and maintenance costs (other than pension contributions, social security and motor vehicle taxes) to the capital assets so constructed. This was done either directly or through clearing accounts in accordance with procedures prescribed by the Federal Power Commission and adopted by the Idaho Public Utilities Commission.

For federal income tax purposes, however, the taxpayer treated the depreciation on transportation equipment differently. It claimed as a deduction from gross income *all* the year's depreciation on such equipment, including that portion attributable to its use in constructing capital facilities. The depreciation was computed on a composite life of 10 years and under straight-line and declining balance methods. The other operating and maintenance costs the taxpayer had charged on its books to capital were not claimed as current expenses and were not deducted.

To summarize: On its books, in accordance with Federal Power Commission-Idaho Public Utilities Commission prescribed methods, the taxpayer capitalized the construction-related depreciation, but for income tax purposes that depreciation increment was claimed as a deduction under § 167 (a).[4]

[4] For 1962 and 1963 the taxpayer's gross construction additions were $8,235,440.22 and $5,988,139.56, respectively. Of these amounts, the taxpayer itself constructed $7,139,940.72 and $5,642,342.79. The

Upon audit, the Commissioner of Internal Revenue disallowed the deduction for the construction-related depreciation. He ruled that that depreciation was a nondeductible capital expenditure to which § 263 (a) had application. He added the amount of the depreciation so disallowed to the taxpayer's adjusted basis in its capital facilities, and then allowed a deduction for an appropriate amount of depreciation on the addition, computed over the useful life (30 years or more) of the property constructed. A deduction for depreciation of the transportation equipment to the extent of its use in day-to-day operation and maintenance was also allowed. The result of these adjustments was the disallowance of depreciation, as claimed by the taxpayer on its returns, in the net amounts of $140,429.75 and $96,811.95 for 1962 and 1963, respectively. This gave rise to asserted deficiencies in taxpayer's income taxes for those two years of $73,023.47 and $50,342.21.

The Tax Court agreed with the decision of the Court of Claims in *Southern Natural Gas*, *supra*, and described that holding as one to the effect that "depreciation allocable to the use of the equipment in the construction of capital improvements was not deductible in the year the equipment was so used but should be capitalized and recovered over the useful life of the assets constructed." 29 T. C. M., at 386. The Tax Court, accordingly, held that the Commissioner "properly disallowed as a deduction . . . this allocable portion of depreciation and that such amount should be capitalized as part of [taxpayer's]

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self-construction portion, therefore, obviously was a substantial part of the gross. The equipment depreciation for those years, to the extent allocated to use in construction and capitalized on the taxpayer's books, amounted to $150,047.42 and $130,523.99, respectively. These were the depreciation amounts deducted for income tax purposes, the major portions of which are presently at issue.

basis in the permanent improvements in the construction of which the equipment was used." *Ibid.*

The Court of Appeals, on the other hand, perceived in the Internal Revenue Code of 1954 the presence of a liberal congressional policy toward depreciation, the underlying theory of which is that capital assets used in business should not be exhausted without provision for replacement. 477 F. 2d, at 690–693. The court concluded that a deduction expressly enumerated in the Code, such as that for depreciation, may properly be taken and that "no exception is made should it relate to a capital item." *Id.*, at 693. Section 263 (a) of the Code was found not to be applicable because depreciation is not an "amount paid out," as required by that section. The court found *Southern Natural Gas* unpersuasive and felt "constrained to distinguish" it in reversing the Tax Court judgment. 477 F. 2d, at 695–696.

The taxpayer asserts that its transportation equipment is used in its "trade or business" and that depreciation thereon is therefore deductible under § 167 (a)(1) of the Code. The Commissioner concedes that § 167 may be said to have a literal application to depreciation on equipment used in capital construction,[3] Brief for Petitioner

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[3] For purposes of the issue here presented, the key phrase of § 167 (a) is "property used in the trade or business." Construction of this phrase in the present context has been infrequent and not consistent. In *Great Northern R. Co.* v. *Commissioner*, 40 F. 2d 372 (CA8), cert. denied, 282 U. S. 855 (1930), the court held that where a railroad transported men and equipment to a construction site, the depreciation of the train attributable to the construction work was to be capitalized. No consideration was given to whether the claimed deduction was available for property used in the taxpayer's trade or business. See also *Gulf, Mobile and Northern R. Co.* v. *Commissioner*, 22 B. T. A. 233, 245–247 (1931), aff'd as to other issues, 63 U. S. App. D. C. 244, 71 F. 2d 953 (1934), aff'd, 293 U. S. 295 (1934); *Missouri Pacific R. Co.* v. *Commissioner*, 22 B. T. A. 267,